(6)

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

No. 95-991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

BRIEF FOR RESPONDENT

Andrew W. Singer
James R. Atwood
(Counsel of Record)
Matthew S. Yeo
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Respondent
International Business
Machines Corporation

February 1996

BEST AVAILABLE COPY

53 pp

QUESTION PRESENTED

Whether the Export Clause of the U.S. Constitution precludes the application of § 4371 of the Internal Revenue Code to premiums paid for casualty insurance on export shipments. To accept the Government's argument that the Export Clause permits the tax, this Court would have to overrule *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915).

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iv

Constitutional Provisions Involved 1

Statement of the Case 3

Summary of Argument 7

Argument 9

I. This Court Has Consistently Held that the Export Clause Precludes the Imposition of Federal Taxes on the Export Process, Whether or Not the Tax Is One of General Applicability. *Thames & Mersey*, Which Controls on the Facts in This Case, Is Part of that Unbroken Line of Authority. 9

A. The Court's Consistent Reading of the Export Clause 10

1. Taxes "laid on Articles exported from any State" 12

2. Taxes not specifically directed at the export process 17

B. The Controlling Force of *Thames & Mersey* . . 25

II. The Government's Request that the Court Overrule *Thames & Mersey* Should Be Rejected. . . 26

A. The "Modern Decisions" Under the Export and Commerce Clauses 28

B. Newer Decisions under the Import/Export Clause 29

C. The Relevance of *Michelin* and *Washington Stevedoring* to the Export Clause 32

D. The Compelling Text of the Constitution 40

III. Even if the Import/Export Clause Analysis Were Relevant to This Case, the § 4371 Tax Is Still Unconstitutional as Applied. 42

Conclusion 45

TABLE OF AUTHORITIES

Cases: **Page**

A.G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) 24-25, 28
Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) 12-14, 37, 38-39, 40
Canton R.R. v. Rogan, 340 U.S. 511 (1951) 29-30
Cornell v. Coyne, 192 U.S. 418 (1904) . . . 20-21, 22, 23
Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978) 5, 8-9, 29-33, 38, 41, 42-43
Fairbank v. United States, 181 U.S. 283 (1901) 7, 8, 14-15, 17, 23, 27-28, 34, 40, 42
Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884) 19
Itel Containers International Corp. v. Huddleston, 507 U.S. 60, 113 S. Ct. 1095 (1993) 31, 43-44
License Tax Cases, 72 U.S. (5 Wall.) 462 (1867) 18
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) 30, 32, 41
Louisiana Land & Exploration Co. v. Pilot Petroleum Corp., 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990) 44
Mayo v. United States, 319 U.S. 441 (1943) 41
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 5, 8-9, 29-33, 37, 41, 42-43
Missouri v. Jenkins, 495 U.S. 33 (1990) 40

Moon v. Freeman, 379 F.2d 382 (9th Cir. 1967) 19
New York v. United States, 326 U.S. 572 (1946) 41
Pace v. Burgess, 92 U.S. 372 (1876) 18-19
Pacific Insurance Co. v. Soule, 74 U.S. 433 (1868) . . 38
Peck & Co. v. Lowe, 247 U.S. 165 (1918) 22-24, 28
Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) 38
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 44
Thames & Mersey Marine Insurance Co. v. United States, 237 U.S. 19 (1915) . . . . . *passim*
Turpin v. Burgess, 117 U.S. 504 (1886) 19-20, 21, 22, 23
United States v. Hvoslef, 237 U.S. 1 (1915) 4, 7, 10, 15-16, 17, 21-24, 31, 33
United States v. New York & Cuba Mail S.S. Co., 200 U.S. 488 (1906) 16
Virginia Indonesia Co. v. Harris County Appraisal District, 910 S.W.2d 905 (Tex. 1995) 44
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 28
Willcuts v. Bunn, 282 U.S. 216 (1931) 17

Constitution, Statutes and Regulations:

U.S. Const. art. I, § 8, cl. 1 . . . . 1, 11, 18, 32, 39, 41
U.S. Const. art. I, § 8, cl. 3 . . . . . 2, 28-29
U.S. Const. art. I, § 9, cl. 4 . . . . . 2, 12, 18
U.S. Const. art. I, § 9, cl. 5 . . . . . *passim*
U.S. Const. art. I, § 9, cl. 6 . . . . . 2, 12, 18
U.S. Const. art. I, § 10, cl. 2 . . . . . *passim*
Revenue Act of 1921, ch. 136, 42 Stat. 227 4

Stamp Act (Mar. 22, 1765), *in Documents of American History* 53 (Henry Steele Commager ed., 6th ed. 1958) 37, 40
War Revenue Act of June 13, 1898, ch. 448, 30 Stat. 448 28
26 U.S.C. § 4371 . . . . . *passim*
26 U.S.C. § 4372 3-4
Reg. 55, art. 110(a) (CCH Fed. Tax Serv. 1926 ed.) 4-5
Rev. Rul. 57-256, 1957-1 C.B. 416 4

Miscellaneous:

Peter V. Bergstrom, *Markets and Merchants: Economic Diversification in Colonial Virginia, 1700-1775* (1980) 34
The Compact Edition of the Oxford English Dictionary (1971) 38
The Documentary History of the Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino ed. 1988) 36
Max Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1966) 11-12, 34-39
The Federalist (Clinton Rossiter ed. 1961) 12, 41
13 The Papers of Benjamin Franklin (Leonard W. Labaree ed. 1969) 37-38
Emory R. Johnson, T.W. Van Metre, G.G. Huebner & D.S. Hanchett, *History of Domestic and Foreign Commerce of the United States* (1915) 34
Samuel Johnson, *Dictionary of the English Language* (1755) 38

Clinton Rossiter, *1787 -- The Grand Convention* (Norton ed. 1987) 11
Thomas P. Slaughter, *The Whiskey Rebellion* (1986) 38
Joseph Story, *Commentaries on the Constitution of the United States* (1833) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-591

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION

CONSTITUTIONAL PROVISIONS INVOLVED

The Government's brief adequately sets out the statutory provisions relevant to this case (U.S. Br. 2-4). A fuller presentation of the relevant provisions of the Constitution of the United States is as follows:

a. Art. I, § 8, cl. 1:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

b. Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

c. Art. I, § 9, cl. 4:

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

d. Art. I, § 9, cl. 5:

"No Tax or Duty shall be laid on Articles exported from any State."

e. Art. I, § 9, cl. 6:

"No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another."

f. Art. I, § 10, cl. 2:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

STATEMENT OF THE CASE

Respondent International Business Machines Corporation (IBM) brought this suit in the United States Court of Federal Claims to obtain a refund of $826,054.55 in taxes assessed under § 4371 of the Internal Revenue Code.[1] Section 4371 (26 U.S.C. § 4371) imposes a tax of four cents per dollar on insurance premiums paid to a foreign insurer for insurance against risks or losses wholly or partly within the United States. *See* 26 U.S.C. §§ 4371 & 4372. As an exporter of computers and other business products, IBM purchased — either directly or through its foreign subsidiaries — casualty insurance to protect against the risk of loss or damage to its products during the export process. The insurance was "point to point"; that is, it applied to each shipment from the time it left IBM's facility in the United States until arrival at the foreign destination. A separate premium was charged for each shipment, with the amount determined by the value of the shipment and underwriting factors such as the time and distance of the trip.[2]

When the insurance was purchased by IBM's foreign subsidiary, a foreign insurance company would typically issue

---

[1] The amount of $1.5 million referenced in the Government's brief (U.S. Br. 5) includes both taxes and interest. *See* Pet. App. 33a.

[2] Pet. App. 39a. IBM exported products to diverse countries around the world, including Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia. The insurance applied during the inland leg in the United States, the overseas portion of the journey, and the inland segment within the foreign country, but in all cases insurance coverage did not commence until the shipment had been tendered in the United States to a common carrier for direct shipment abroad. Pet. App. 36a-39a.

the policy. The statutory language of § 4371 would thus be triggered, even though only a small portion of the voyage occurred within the United States. The tax applies where a domestic company is insured by a foreign insurer against risks "wholly or partly" within the United States (26 U.S.C. § 4372(d)), and the Government has construed this to mean that the tax applies to the entire premium for insurance on an international shipment, without apportionment, if more than a "trifling" portion of the shipment is within the United States. *See* Rev. Rul. 57-256, 1957-1 C.B. 416.

Eighty years ago, this Court held in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), that a similar federal tax levied against premiums paid for marine casualty insurance was unconstitutional as applied to export shipments. The reason was the Export Clause of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Court in *Thames & Mersey* concluded that a tax upon insurance policies covering export shipments was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915). Based on the authority of *Thames & Mersey*, IBM took the position that the Internal Revenue Service could not constitutionally apply § 4371 to casualty insurance premiums for its export shipments.[3]

---

[3] An earlier version of § 4371 (Revenue Act of 1921, ch. 136, §§ 1107, 42 Stat. 227, 306) was -- presumably in deference to *Thames & Mersey* -- accompanied by a regulation that administratively excluded insurance on exports from the scope of the tax:

(continued...)

After audit of IBM's tax returns for the years 1975 through 1984, the Internal Revenue Service maintained that IBM was liable for the § 4371 tax insofar as the policies purchased from foreign insurers applied to IBM's exports from the United States. (Pet. App. 17a) IBM paid the tax under protest and filed suit for refund. In the lower courts and in its briefing to this Court, the Government has conceded that — if the Export Clause was correctly interpreted and applied in *Thames & Mersey* — then the tax here is also unconstitutional as applied and that IBM is entitled to a full refund. (Pet. App. 1a & 22a; U.S. Br. 12 n.3)

On stipulated facts, the Court of Federal Claims (Senior Judge Thomas J. Lydon) granted IBM's motion for summary judgment and denied the Government's cross-motion. The court held that, on the facts presented, "the tax imposed by § 4371 is a tax that amounts to a tax on exports" (Pet. App. 26a); that *Thames & Mersey* was controlling (*id.* 27a); and that recent Court decisions under the Import/Export Clause[4] could not be read as rejecting this Court's established rulings under the Export Clause (*id.* 27a). As an alternative ground, Judge Lydon also ruled that the federal tax here and in *Thames & Mersey* were distinguishable from the state taxes

---

[3](...continued)

> "No tax is imposed upon the premium charged for insurance issued to cover commodities which are in the actual process of exportation and which have begun their voyage or preparation for the voyage from the United States."

Reg. 55, art. 110(a) (CCH Fed. Tax Serv. 1926 ed.). The regulation lapsed without explanation.

[4] Principally *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

upheld in recent Import-Export Clause rulings:

> "Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports"

and thus was unconstitutional as applied. (Pet. App. 29a) This was because § 4371 amounted to an ad valorem tax on export goods in transit,[5] a type of tax that this Court's recent Import/Export Clause rulings indicated was distinguishable from the state taxes that were there upheld. (*Id.* 29a)

The Federal Circuit Court of Appeals affirmed in a unanimous decision by Judge William C. Bryson (Chief Judge Archer and Judge Plager joining). After reviewing the history of the Export Clause, the court of appeals observed: "Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction." (*Id.* 5a) While this Court has in recent years narrowed its construction of the Import/Export Clause applicable to state taxation,

> "[s]upport for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy between the Import-Export Clause and the Export Clause." (*Id.* 9a)

---

[5] The tax imposed by § 4371 varies directly with the declared value of the export shipment. Pet. App. 39a.

Hence, on the basis of established precedents and the "undisputed applicability of *Thames & Mersey*" (*id.* 11a), the court of appeals held that the § 4371 tax as applied to IBM's export shipments was unconstitutional.

SUMMARY OF ARGUMENT

I. *Thames & Mersey* correctly applied the Export Clause in prohibiting the imposition of a federal excise tax on premiums for casualty insurance that covers export shipments. Although the federal government generally has broad authority to levy taxes, the Export Clause is an express and unequivocal restriction on that power: "No Tax or Duty shall be laid on Articles exported from any State." This is not simply a prohibition of taxes that discriminate against exports -- *i.e.*, taxes that are levied on exports *qua* exports. *E.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 292 (1901); *United States* v. *Hvoslef*, 237 U.S. 1 (1915). Instead, the Export Clause has consistently been read as an exemption from *all* federal taxes as applied to the export process. "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" *Fairbank* v. *United States*, 181 U.S. at 290. Insurance is an integral part of the export process, and the premiums paid vary directly with the value of the product. As *Thames & Mersey* concluded, a federal excise tax as applied to such insurance is an impermissible tax on the export process.

II. The Government argues that the Court should now adopt the "modern doctrine" developed under the Import/-Export Clause to overrule *Thames & Mersey* and, indeed, to repudiate this Court's analysis in a half-dozen other Export Clause cases. The argument that the Export Clause should now be reinterpreted to fit the new Import/Export Clause mold has no justification -- historical *or* modern. The proposed

interpretation distorts the plain meaning of a constitutional provision that was an important compromise at the 1787 Constitutional Convention, and one that has been consistently understood as exempting the export process from federal taxation, discriminatory or not. The § 4371 tax at issue here fits squarely within the scope of the Export Clause as construed and applied in a long line of Court decisions.

Moreover, the Government's argument would require the Court to disregard -- indeed, to repudiate -- the analysis in the same "modern" cases on which the Government relies. This is because the Court, when it recently reinterpreted the Import/Export Clause to permit greater freedom for State taxation, applied an analysis that *supports* rather than undermines the historically broad scope of the Export Clause. The Court stressed that the Import/Export Clause prohibits only State "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every 'tax.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 (1976) (emphasis in original). *See also Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 759 (1978). By comparison, the Export Clause does say "No Tax." Moreover, the modern Import/Export Clause cases turned on the Court's understanding of the specific and narrow purposes that underlay that constitutional provision, purposes that were not frustrated by non-discriminatory state taxation. The Export Clause, by contrast, was designed to serve broader purposes and was intended by the Framers to be absolute and unqualified in scope. The Framers intended that "exports should not be made a source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. at 292), and nothing in the newer cases cited by the Government supports a different conclusion.

III. Even if the Government were right that the Export Clause and Import/Export Clause should be construed in

identical fashion, the result in this case is still unchanged. As the Claims Court below ruled in its alternative holding, the § 4371 tax at issue here -- like the tax in *Thames & Mersey* -- applies to goods during the international journey and bears a direct relation to the value of those goods. This is unlike the state taxes upheld in *Michelin* and *Washington Stevedoring*, where in one case the goods were not in transit and in the other the tax was unrelated to value. Indeed, *Washington Stevedoring* distinguished *Thames & Mersey* on the ground that a tax on insurance premiums varies directly with the value of the goods. Thus, even under the Import/Export Clause analysis set forth in the Court's recent decisions, the federal excise tax here is still unconstitutional as applied.

ARGUMENT

I. This Court Has Consistently Held that the Export Clause Precludes the Imposition of Federal Taxes on the Export Process, Whether or Not the Tax Is One of General Applicability. *Thames & Mersey*, Which Controls on the Facts in This Case, Is Part of that Unbroken Line of Authority.

The Government's brief (U.S. Br. 19-26) may leave the impression that the Court has vacillated in its interpretation of the Export Clause, sometimes viewing the issue of discrimination against exports as important and other times not. That is not so. The Court's reading of the Export Clause has been entirely consistent: the process of exportation is immune from federal taxation, period. This includes the articles of export themselves, as well as the documents and transactions involved in the export process. The issue of discrimination has been relevant only when the tax at issue did not apply *during* or *to* the export process. But if the tax applies during or to

the export process, the Constitution prohibits federal taxation, whether or not the tax is specifically directed at exports *qua* exports.

Thames & Mersey is squarely within this unbroken line of precedent. It holds that even a non-discriminatory excise tax may not be applied to casualty insurance purchased for export shipments because such a tax is "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. at 13. *Thames & Mersey* controls on the facts of this case.

A. The Court's Consistent Reading of the Export Clause

The Export Clause has not needed frequent judicial consideration, presumably because its text is clear enough: "No Tax or Duty shall be laid on Articles exported from any State." The clause was inserted during the Constitutional Convention at the insistence primarily of the southern States, whose economies were dependent on exports of regional crops such as tobacco, rice, and indigo. Whereas under the Articles of Confederation Congress could raise revenue only by requisitioning funds from the States, the Constitution was to give the federal government the unaccustomed power to impose its own taxes. The South, fearing that the Northern and Mid-Atlantic States would dominate Congress, insisted that exports be excepted from the taxing power.[6] Certain

[6] When in July 1787 the Convention's Committee of the Whole was to adjourn and to refer drafting matters to the Committee of Detail, General Pinckney of South Carolina

(continued...)

Northern delegates also supported the clause because they believed a tax exemption would encourage development of domestic industries[7] and because they feared the federal government might become too powerful and use its control over exports to extract concessions from the States.[8]

The Constitution that emerged from the 1787 Convention gave Congress general power to lay and collect taxes (art. I, § 8, cl. 1), but that power was subject to express limitations. Taxes and duties against exports were prohibited outright. Art. I, § 9, cl. 5. In addition, duties, imposts, and excises had to be uniform throughout the United States (art. I, § 8, cl. 1) and could not discriminate against the ports of one State

[6](...continued)

"reminded the Convention that if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report."

Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787* 95 (rev. ed. 1966) ("*Records*"). *See also id.* at 362-63 (statement of George Mason of Virginia). The August 6 report of the Committee of Detail did then include a provision that "No tax or duty shall be laid by the Legislature on articles exported from any State . . . ." *Id.* at 359 n.15. It was commented that "It seems to be feared that the Northern States will oppress the trade of the Southn." *Id.* at 359 (statement of John Langdon of New Hampshire). Various proposals to weaken the provision were considered but rejected (*id.* at 359-63), and the provision emerged from the Convention essentially unchanged. *See generally* Clinton Rossiter, *1787 -- The Grand Convention* 200, 209 & 217 (Norton ed. 1987).

[7] 2 *Records* at 360 (statement of Oliver Ellsworth of Connecticut).

[8] *E.g.*, *id.* at 362 (statement of Elbridge Gerry of Massachusetts).

over those of another (art. I, § 9, cl. 6). Direct taxes could only be laid in proportion to the census. Art. I, § 9, cl. 4. Taking these provisions as a whole, and given that the apportionment requirement was seen as a significant limitation on direct federal taxes, it was expected that taxation of imports would be the principal source of revenue for the federal government.[9] As for exports, however, "the hands of the Legislature were absolutely tied. . . -- exports could not be taxed."[10]

In light of this strong intent and the Export Clause's clear language, it is not surprising that the Court has given the Clause a broad and consistent interpretation.

1. Taxes "laid on Articles exported from any State"

One early issue of interpretation was whether the constitutional prohibition of taxes "laid on Articles exported" literally required that the tax apply directly to the exported product, or whether the Export Clause would also prohibit a tax that was levied on the export process in some other manner. In *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827), the Court addressed this issue, albeit in dictum because the case involved a state rather than federal tax and thus was decided

---

[9] *See, e.g.*, The Federalist No. 12, at 93 (Alexander Hamilton), No. 36, at 222 (Hamilton), No. 41, at 262 (James Madison) (Clinton Rossiter ed. 1961).

[10] 2 *Records* at 220 (statement of Rufus King of Massachusetts). *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) (by virtue of the Export Clause, "[t]he power is, therefore, wholly taken away to intermeddle with the subject of exports").

under the Import/Export Clause applicable to the States.[11] Maryland required all import traders to pay a license fee, and the issue was whether that levy was "on Imports or Exports" within the meaning of the Import/Export Clause. In concluding that it was, Chief Justice Marshall referred by analogy to a hypothetical federal tax on the occupation of exporting. Such a tax, he suggested, would clearly violate the Export Clause even though not laid directly on the articles of export.[12] It was in this context -- on the issue whether a tax might be "laid on Articles exported" even though not imposed directly on the articles themselves -- that Chief Justice Marshall made the statement that is enthusiastically embraced in the Government's brief (U.S. Br. 17): "There is some diversity in language [between the Export Clause and the Import/Export Clause], but none is perceivable in the act

---

[11] Art. I, § 10, cl. 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

[12] "The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

25 U.S. at 445.

which is prohibited."[13]

In accord with Chief Justice Marshall's dictum, the Court has consistently held that the Export Clause cannot be avoided by the expediency of applying a federal revenue measure to a transaction that is a part of the export process rather than to the exported products themselves. The issue was addressed most directly in *Fairbank* v. *United States*, 181 U.S. 283 (1901), which struck down a federal stamp tax on bills of lading for export shipments. The Government argued that the Export Clause did not apply because the tax applied to bills of lading and not to articles of export. The Court concluded that an express constitutional prohibition on federal powers could not be construed so narrowly.[14] An important purpose of the Constitution was to ensure "free exportation," a principle that would be violated by federal taxation of the export process:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether

---

[13] 25 U.S. at 445. The Export Clause provides that "No Tax or Duty shall be *laid on* Articles exported," whereas the Import/Export Clause provides that a State may not "*lay* any Imposts or Duties *on* Imports or Exports" (emphasis added). Obviously, the diversity of language between "laid on" and "lay . . . on" does not suggest a substantive difference. Chief Justice Marshall was not, however, addressing a different and more significant variance between the two clauses -- the use of "Tax or Duty" in the Export Clause and "Impost or Duty" in the Import/Export Clause. See pages 30-31, 37-39 *infra*.

[14] "[I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety." 181 U.S. at 289.

> such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and . . . no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of ten cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution."

181 U.S. at 290-91. Thus:

> "[T]he freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance."

Id. at 295.

The Court reaffirmed this principle in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), and *Thames & Mersey Marine*

Ins. Co. v. *United States*, 237 U.S. 19 (1915). The first struck down a federal tax on charter parties to the extent that the tax was applied to charters for export shipments. Rejecting the Government's argument that the tax "only incidentally and remotely affected articles exported" and "was not a tax on articles exported" (237 U.S. at 4), the Court held that the Export Clause "is designed to give immunity from taxation to property that is in the actual course of exportation" and "[t]his constitutional freedom . . . plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves." *Id.* at 13. Under the facts of the case,

> "[t]he charters were for the exportation; they related to it exclusively; they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."

Id. at 17. Similarly in *Thames & Mersey* (about which more later, pp. 25-26), the Court struck down a federal excise tax on insurance premiums as applied to marine insurance for export shipments: "proper insurance during the voyage is one of the necessities of exportation," and thus the excise tax on premiums "falls on the exporting process" and hence is "within the constitutional prohibition." 237 U.S. at 27.[15]

---

[15] *See also United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906), which involved a federal stamp tax on cargo manifests for ships bound for foreign ports. The United States conceded that the tax was unconstitutional under the authority of *Fairbank* but nonetheless prevailed on the ground that the taxpayer had failed to protest the tax at the time of payment.

This line of Export Clause cases was aptly summarized in *Willcuts* v. *Bunn*, 282 U.S. 216, 228 (1931):

> "[W]ith respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. [Citing *Fairbank*, *Hvoslef*, and *Thames & Mersey*.] Only on that construction can the constitutional safeguard be maintained."

2. Taxes not specifically directed at the export process

Although characterizing the § 4371 tax as having "only an incidental and remote relationship to exports and the export process" (U.S. Br. 34), the Government does not challenge the principle just discussed that the Export Clause applies to taxes on the export process as well as to taxes on articles of export. Indeed, the Government endorses *Fairbank* v. *United States* as a correct interpretation of the Export Clause (*see* U.S. Br. 21-23), and *Fairbank* addresses most fully the principle that a tax on the export process is a tax "on Articles exported." Instead, the Government argues that the Export Clause should be confined to discriminatory taxes that are imposed specifically upon exports, and that a generally applicable tax should be allowed even to the extent it applies to exports.

On this point too, the Court's decisions have been consistent and unwavering. If a federal tax is applied to or during the export process, it violates the Export Clause even if non-discriminatory. If, however, the tax applies prior to or after the export journey, the tax is unconstitutional if it discriminates against exports but constitutional if it does not.

As for the Government's argument that non-discriminatory taxes may be applied to the export process itself, this Court has consistently rejected that position. While the Constitution contains other provisions designed to prohibit discriminatory federal taxation,[16] the Export Clause is an unqualified exception from the power to tax.

Our discussion on this point begins with the first case in which the Court was asked to consider an Export Clause challenge to a federal revenue measure. In 1868, Congress had enacted an excise tax on the manufacturing of tobacco but exempted all tobacco intended for export. The same statute required, however, that exempted tobacco be packaged with an identifying stamp for which the government charged a fee of 25 cents. That fee was challenged as violative of the Export Clause in *Pace* v. *Burgess*, 92 U.S. 372 (1876), but the Court rejected the claim on the ground that the fee was not a "tax" or "duty" within the meaning of the Clause. The stamp was intended only to separate and identify tobacco that was exempt from the standard tax, and the fee bore no relationship to the quantity or value of the export package and was intended only to cover the costs of administering the tax

---

[16] *See* art. I, § 8, cl. 1 (all duties, imposts, and excises must be uniform throughout the United States); art. I, § 9, cl. 6 (no discrimination between ports in terms of regulation or revenue). In the *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), the Court compared "qualifications" on the federal taxing power with the "exception" granted for export commerce:

> "[T]he power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment [art. I, § 9, cl. 4] and indirect taxes by the rule of uniformity [art. I, § 8, cl. 1]."

exemption. Thus, the fee was not a "tax" or "duty" subject to the constitutional prohibition.[17]

The same statute returned to the Court in *Turpin* v. *Burgess*, 117 U.S. 504 (1886). In 1882, Congress repealed the exemption stamp fee but in so doing described the fee as an "export tax." Seizing on that terminology, another tobacco manufacturer sought to recover past payments. The Court rejected the claim, reaffirming its holding in *Pace* v. *Burgess* that the stamp fee did not amount to a "tax." The Court was unimpressed by the subsequent congressional characterization of the fee, suggesting that Congress may have unwittingly adopted a term proposed by industry lobbyists. *Id.* at 505-06.

The Court went on, though, to state an alternative rationale -- one that laid the groundwork for all subsequent decisions under the Export Clause. In discussing both the Export Clause and the Import/Export Clause, the Court stated:

> "The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, *or whilst they are being exported*. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a *general tax*, laid on all property alike, *and not levied on goods in*

---

[17] Consistent with *Pace* v. *Burgess*, the rule has developed that the Export Clause does not prohibit user fees or other similar charges that are not general revenue measures but instead are regulatory in nature or designed only to defray governmental expenses specifically associated with export of the products in question. *E.g.*, *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Moon* v. *Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967). Here, the Government has conceded that § 4371 is a "tax" in the constitutional sense and does not qualify for this regulatory exception. *E.g.*, Pet. App. 6a, 17a-18a, 22a.

> *course of exportation, nor because of their intended exportation*, is not within the constitutional prohibition."

117 U.S. at 507 (emphasis added).

Thus, the Export Clause would prohibit any tax -- even a "general tax" -- if it is levied on goods "whilst they are being exported" (or, "in course of exportation"). On the other hand, if the tax is imposed *prior* to commencement of the export process, the validity of the tax will depend on whether it is specifically directed at exports (*i.e.*, on whether the goods are taxed "because of their intended exportation"). This issue of discrimination is not relevant, though, if the tax applies during or to the export process. Based on this standard, the *Turpin* Court concluded that the tobacco stamp levy was not objectionable because "the tax (if it was a tax) was laid upon the goods before they had left the factory" and thus "were not in course of exportation." *Id.* at 507. Nor, in the circumstances of the case, did the stamp fee discriminate against exports. *Id.* at 507-08.[18]

The Court applied this identical standard in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), which considered the constitutionality of a federal excise tax on the manufacturing of

---

[18] This latter point was true because the stamp fee permitted exports to be charged at a lower rate than domestic goods:

> "A special indulgence was granted to [plaintiffs] (in common with others), in reference to the particular tobacco which they declared it to be their intention to export. . . . In this view of the case, the plaintiffs not only had no ground of complaint, but they were really the objects of favorable treatment on the part of the government, which, on the slight and easy conditions referred to, accepted their declared intention to export the tobacco in question, before it was commenced to be exported, or put in the way of exportation."

filled cheese. The tax was non-discriminatory as to cheese manufactured for domestic and export markets, but the taxpayer argued that the Export Clause nevertheless precluded application of the tax to cheese that was manufactured under contract for export and that was then in fact exported. The Court rejected the taxpayer's argument, but not simply because the tax was non-discriminatory. Rather, the tax was constitutional because it was *both* non-discriminatory *and* applied to the manufacturing process *prior* to the commencement of the export journey:

> "A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that *no burden by way of tax or duty can be cast upon the exportation of articles*, and does not mean that articles exported are relieved from the *prior* ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article *before its exportation*."

192 U.S. at 427 (emphasis added).

Under the Government's proposed theory of the Export Clause, the Court in *Cornell* reached the right result for the wrong reason; because the tax was non-discriminatory, that should have been the end of the analysis. However, the Court did not apply the Government's proposed analysis but instead applied the analysis of *Turpin* v. *Burgess*: the tax was constitutional only because it was both non-discriminatory and was not applicable to the export process. And, in so ruling, the Court reaffirmed that the export process itself was exempt from any taxation, whether discriminatory or not.

Hvoslef and *Thames & Mersey*, both decided eleven years after *Cornell*, were therefore not aberrations or unwitting missteps, as the Government suggests, but instead represented consistent applications of the standard already announced in *Turpin* v. *Burgess* and *Cornell*. *Hvoslef* involved a non-discriminatory federal tax on contracts for ship charters, and the Court held that the tax violated the Export Clause to the extent it was applied to charters for export shipments: "the tax as applied to the [export] charter parties here in question was nothing else than a tax on exportation and to this extent was in any event invalid." 237 U.S. at 17-18. The tax on insurance premiums in *Thames & Mersey*, while again not discriminating against exports, met the same fate to the extent the tax was applied to export shipments. In both cases, the tax applied to the export process itself and thus, as applied, violated the Export Clause even though non-discriminatory.

The Court's next Export Clause decision was *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918), which held that the new federal income tax made possible by the Sixteenth Amendment could be applied to all income of a domestic corporation, including income derived from exports. The Government suggests (U.S. Br. 24-26) that *Peck & Co.* was in tension with *Hvoslef* and *Thames & Mersey*, decided just three years earlier, and supports the "modern" theory of the Export Clause it urges in this case. In support of that suggestion, the Government states that *Peck & Co.* stressed the non-discriminatory aspect of the tax in question (with citations to *Turpin* and *Cornell*), whereas non-discrimination had not saved the taxes that had been struck down in *Hvoslef* and *Thames & Mersey*.

There is no tension, however, because *Peck & Co.* applied precisely the same standard that has been applied in all the Court's decisions under the Export Clause. Citing both *Hvoslef* and *Thames & Mersey* and quoting with approval from

the latter, the Court in *Peck* reiterated that the Export Clause excepts from the federal taxation power

> "articles in the course of exportation, the act or occupation of exporting, bills of lading for articles being exported, charter parties for the carriage of cargoes from state to foreign ports, *United States* v. *Hvoslef, 237 U.S. 1;* and policies of marine insurance on articles being exported, -- such insurance being uniformly regarded as 'an integral part of the exportation' and the policy as 'one of the ordinary shipping documents,' *Thames and Mersey Insurance Co.* v. *United States*, 237 U.S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation.' *Fairbank* v. *United States*, [181 U.S.] at 292-293."

247 U.S. at 173 (emphasis in original; other citations omitted).

Applying this standard, the Court upheld the income tax in *Peck & Co.* because the tax was "not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes." *Id.* at 174. The tax applied only to net income, based on all the company's revenues and costs and calculated well after the exportation process was finished. The tax was thus analogous to the manufacturing taxes in *Turpin* v. *Burgess* and *Cornell*, which were applied prior to the start of the export journey. It was in this context -- a tax not applied to the export process itself -- that the issue of discrimination was relevant.

The fact that *Peck & Co.* did not signal a revised construction of the Export Clause is proven by *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), where five years after *Peck* the Government made and lost precisely the same argument that it advances today. *Spalding* involved a federal excise tax on the sale of sporting equipment. Although the tax was non-discriminatory, the Spalding company challenged its application to sales made in export commerce. The Solicitor General, in seeking to defend the tax, argued that discrimination was the sole issue:

> "From the history of the Export Clause in the Constitution, it will appear that the framers had in mind a tax levied directly and deliberately upon the act of exportation. They were not considering the application of general taxing laws, which might fall in individual cases upon merchandise, which might thereafter be exported."

Id. at 66. The Court, in a unanimous decision by Justice Holmes, flatly rejected the Government's argument:

> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State', because that is forbidden in terms by the Constitution. Article I, § 9. *United States* v. *Hvoslef*, 237 U.S. 1, 18. . . . Articles in course of transportation cannot be taxed. *William E. Peck & Co.* v. *Lowe*, 247 U.S. [at] 173."

262 U.S. at 69. The tax in question was applied at the time the goods were delivered to the common carrier for shipment

abroad, and thus the tax was imposed on the export process in violation of the Constitution:

> "To put [the taxable event] at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19." 262 U.S. at 70.

B. The Controlling Force of *Thames & Mersey*

We see, then, that *Thames & Mersey* fits squarely within the Court's consistent interpretation of the Export Clause and has been frequently relied upon and cited with approval, even in cases which the Government suggests are supportive of its position. *Thames & Mersey* involved a non-discriminatory federal tax -- an excise tax on casualty marine insurance, whether for domestic or export shipments. But, as applied to exports, it was held unconstitutional. Insurance "is essential to the process of exporting" (*Thames & Mersey*, 237 U.S. at 26), "one of the necessities of exportation" (*id.* at 27). Applying a federal excise tax to such insurance placed an impermissible burden on the exportation process:

> "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." *Id.* at 27.

The Government thus concedes, as it must, that *Thames & Mersey* is indistinguishable from this case and -- unless overruled -- compels affirmance of the judgment below. The § 4371 tax has been applied to insurance policies that cover IBM's export shipments from the time the products are delivered to a common carrier for shipment abroad, to the time the products arrive at their foreign destination. The tax varies directly with the value of the exports, because the tax is a fixed percentage of the premiums and the premiums in turn vary directly with the cargo's value. In practical effect the tax is an ad valorem tax on the cargo's value and applies directly to and throughout the export process. It is therefore unconstitutional under *Thames & Mersey*, even if it does not discriminate against exports.

II. The Government's Request that the Court Overrule *Thames & Mersey* Should Be Rejected.

The Government's argument for overruling *Thames & Mersey* boils down to this: For many years, the Export Clause and Import/Export Clause were construed in tandem (which is true). Then, in the 1970s, the Court changed its interpretation of the Import/Export Clause to permit non-discriminatory State taxation of imports and exports (also true, to a degree[19]). Thus (in the Government's view), this "modern doctrine" should now be applied to the Export Clause.

What this argument lacks is analysis of *why* the Court changed its interpretation of the Import/Export Clause, and

---

[19] As discussed in Part III below (pp. 42-44), the Government's reading of the holdings of the new Import/Export Clause cases is somewhat more expansive than is merited.

whether the reasons for that change apply to the Export Clause. Without such an analysis, the Government's argument is no more logical than this: For many years, it was commonly thought that porpoises and tuna were both fish. Then, scientists discovered that the porpoise was actually a mammal. Therefore, we now know that tuna are mammals as well. Obviously, one should not jump to this second conclusion without first examining the reasons *why* scientists changed their minds about porpoises (warm- rather than cold-blooded, etc.) and then considering whether or not those reasons apply to tuna. For all practical purposes, the Government's argument omits consideration of those critical questions.

The explanation for the omission is evident: The reasons the Court changed its analysis of the Import/Export Clause are *not* applicable to the Export Clause. To the contrary, those reasons confirm rather than refute the Court's long-standing conclusion that the Export Clause precludes federal taxation of the export process, discriminatory or not.[20]

---

[20] It is worth noting that the line the Government seeks to draw between discriminatory and non-discriminatory taxes will often be hazy. A facially non-discriminatory tax may be imposed only against products that are predominantly exported (*e.g.*, right-hand-drive automobiles), or a tax in practical effect may weigh more heavily on exports than domestic goods. The § 4371 tax is itself an example, because insurance premiums (and therefore the tax) will typically be higher for long international shipments than for domestic shipments, even when the intra-U.S. transportation legs of the two shipments are of the same length.

Similarly, a tax that on its face is specifically directed at exports may not seem so discriminatory when viewed in the broader context. For example, the tax provision in *Fairbank* applied only to export

(continued...)

A. The "Modern Decisions" Under the Export and Commerce Clauses

Before turning to the Import/Export Clause cases, we first address briefly two other categories of "modern decisions" (U.S. Br. 24) which the Government claims support a new reading of the Export Clause. The first is itself an Export Clause case -- *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918) (U.S. Br. 24-26). But, as already discussed (pages 22-24 *supra*), *Peck & Co.* is entirely consistent with the Court's historical reading of the Export Clause, and it quotes and cites *Thames & Mersey* with approval. And, in the subsequent *Spalding* decision, the Court flatly rejected the very argument for reinterpretation of the Export Clause that the Government makes here today. *See* page 24 *supra*. Hence, neither *Peck* nor *Spalding* supports the Government's position.

The Government's second category of cases is even more startling -- cases under the Commerce Clause in which the Court held that the negative implications of that Clause did not preclude non-discriminatory State taxation of businesses engaged in interstate commerce. *E.g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); U.S. Br. 26. Quite the reverse of the Export Clause, the Commerce Clause is a federal *grant* of power *to* the federal government, and -- for reasons well known to the Court -- that clause has been construed by implication to restrict State powers in only limited circumstances. The negative implications of the Commerce Clause are hardly a valuable guide in construing an

---

[20](...continued)
transactions, but it was part of a far broader tax bill that separately taxed comparable domestic transactions, albeit in different ways or at different rates. *See* War Revenue Act of June 13, 1898, ch. 448, 30 Stat. 448.

express and categorical constitutional limitation on federal powers. As the Government elsewhere in its brief concedes, "decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause." U.S. Br. 22 n.8.

B. Newer Decisions under the Import/Export Clause

The Government's principal argument for overruling *Thames & Mersey* rests on recent cases under the Import/-Export Clause, in particular *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). *Michelin* and *Washington Stevedoring* held that the Import/-Export Clause did not prohibit the application of certain non-discriminatory State taxes to import and export commerce, and the Government now argues that the same analysis should govern the Export Clause. But *Michelin* and *Washington Stevedoring* provide no support for a revised reading of the Export Clause. Indeed, the analysis that the Court invoked to narrow the protections of the Import/Export Clause with respect to State taxation is consistent with and actually supports the Court's long-standing rule of broader protection under the Export Clause.[21]

---

[21] The Government also cites two other Import/Export Clause cases, but they can be disposed of quickly. *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951) (U.S. Br. 27), upheld a Maryland franchise tax imposed on railroads and measured by the carrier's gross receipts apportioned by the length of its lines within the State. The taxpayer claimed that the tax could not be applied to the extent its lines were used to carry imports and exports in the Baltimore harbor. Because the transportation services

(continued...)

In *Michelin*, the Court held that Georgia's ad valorem property tax could be applied to imported goods no longer in transit in the same manner that the tax applied to domestic goods. The Court reasoned that the Import/Export Clause was intended by the Framers to serve three purposes: (1) that the federal government speak with one voice in regulating foreign commerce; (2) that federal import revenues not be diverted to the States; and (3) that State imposts and duties not disrupt harmony among the States, particularly between seaboard and inland States. 423 U.S. at 285-86. A non-discriminatory State property tax, applied equally to domestic and imported goods, did not clash with those objectives.

The *Michelin* Court then observed that, consistent with its limited objectives, the Import/Export Clause was phrased in terms of a prohibition only of State "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every '*tax*'." *Id.* at 290 (emphasis added). Relying on historical sources, the Court found the omission from the Import/Export Clause of the term "tax" to be important and to signify that the clause should apply only

---

[21](...continued)
in question were provided wholly within the State and the taxpayer was not itself engaged in the import/export business (*id.* at 514), the Court found no infringement of the Import/Export Clause. *Fairbank*, *Hvoslef* and *Thames & Mersey* were distinguished as more directly involving the exportation process, and the Court also noted that those federal tax cases had been decided under the Export Clause rather than the Import/Export Clause. *Id.* & n.2.

Limbach v. *Hooven & Allison Co.*, 466 U.S. 353 (1984) (U.S. Br. 31-32), was also decided under the Import/Export Clause and applied the new construction of that provision adopted in *Michelin* and *Washington Stevedoring*. Neither the Export Clause nor any of its precedents were discussed.

to revenue measures that were targeted at goods produced abroad. *Id.* at 287, 291-93. That is, generally applicable State taxes are "[u]nlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country . . . ." *Id.* at 287.[22]

This line of reasoning was extended to State taxation of exports in *Washington Stevedoring*. That case involved Washington's business and occupation tax as applied to stevedoring activities conducted within the State. The Court reviewed the limited purposes of the Import/Export Clause that had been identified in *Michelin* and found here too that the State tax did not offend those objectives. As the tax did not discriminate between export and domestic commerce and applied only to services conducted within the State, the tax caused neither disharmony among the States nor disruption of federal foreign affairs. Moreover (and a point the Government's brief in this case wholly ignores), a State tax affecting exports would not interfere with federal tax revenues because the federal government was itself precluded by the Export Clause from taxing exports.[23] The Court then reiterated the "central holding" of *Michelin*: that the Import/Export Clause by its terms was a prohibition "only of 'Imposts or Duties' and not of all taxes." 435 U.S. at 759. A non-discriminatory State

---

[22] Thus, the Court construed "imposts and duties" in the Import/-Export Clause as analogous to the treaty language at issue in *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 113 S. Ct. 1095 (1993), which applied only to revenue measures "collected on, or in connexion [sic] with, the importation of goods" or "chargeable by reason of importation," but not to taxes generally. 113 S. Ct. at 1099.

[23] The Import/Export Clause as applied to exports "does not serve to protect federal revenues . . ., *because the Constitution forbids federal taxation of exports*. U.S. Const., Art. I, § 9, cl. 5; see *United States* v. *Hvoslef*, 237 U.S. 1 (1915)." 435 U.S. at 758 (emphasis added).

levy on services performed within the taxing state was thus held not to be an impost or duty within the meaning of the Import/Export Clause. *Id.* at 761.

C. The Relevance of *Michelin* and *Washington Stevedoring* to the Export Clause

Plainly, *Michelin* and *Washington Stevedoring* cannot be read as supporting the Government's proposed reinterpretation of the Export Clause. Both rulings were based on a textual examination of the Import/Export Clause (dealing with imposts and duties but "not written in terms of a broad prohibition of every 'tax'"; *Michelin*, 423 U.S. at 290) and on the limited purposes which the Framers intended that clause to serve. Both decisions stressed the omission of the word "tax" from the Import/Export Clause prohibition and both contrasted that language with the Article I, § 8, cl. 1 grant to Congress of the "Power To lay and collect *Taxes*, Duties, Imposts and Excises." *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759 (emphasis added). The language of the Export Clause similarly contrasts with the Import/Export Clause, for the Export Clause provides: "*No Tax* or Duty shall be laid on Articles exported from any State." (Emphasis added). The absence of a prohibition on "taxes" in the Import/Export Clause was central to the *Michelin* and *Washington Stevedoring* holdings, and belies the notion that those decisions are guidance to interpreting the Export Clause, which explicitly *does* prohibit any federal "*tax*." *See also Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("The new focus [under the Import/Export Clause is] on whether the tax sought to be imposed is an 'Impost or Duty.'").

But the defect in the Government's position is deeper than linguistic. *Michelin* and *Washington Stevedoring* concluded

that the objectives of the Import/Export Clause were to ensure that the States not intrude on specified federal prerogatives (foreign affairs and import revenues) and that maritime states not exploit their geographic position against inland states. *Michelin*, 423 U.S. at 285-86; *Washington Stevedoring*, 435 U.S. at 752-53. Quite obviously, these were not the objectives of the Export Clause, which imposes restrictions on the *federal* government (not on the States) and does not deal with relations among the State governments. Indeed, the discussion in *Washington Stevedoring* of the Import/Export Clause objectives cannot be reconciled with the Government's position here. There, the Court noted that one purpose of the Import/Export Clause was to ensure that the States did not impair federal taxation of imports, which were expected to be a major source of revenue for the national government. In addressing the relevance of that objective in the export context, the Court observed that giving the States greater taxing leeway would not impair federal revenues because *the federal government itself could not tax exports*. 435 U.S. at 758, citing the Export Clause and *United States* v. *Hvoslef*.[24] It defies logic for the Government to argue that *Washington Stevedoring* supports new, broader taxing authority for the federal government, when the Court's holding that the States could tax exports relied directly on the proposition that the federal government could not.

A sharp distinction between the scope of the Export Clause and Import/Export Clause is also compelled by the historical record. The principal (although not exclusive) purpose behind the Export Clause was to deny Congress the power to burden Southern exports of regional crops that were

---

[24] *See* note 23 *supra*.

not grown in other States (tobacco, indigo, etc.).[25] Obviously, even a "non-discriminatory" tax on tobacco shipments (for example) would have precisely that effect.[26] So important was this issue that the Export Clause was among the most actively debated compromises at the 1787 Convention.[27] The question whether the federal government could tax exports was interwoven with other fundamental issues, including the apportionment of direct taxes by population and the status of slavery. Some delegates declared emphatically that the Export Clause exemption was necessary for their support for any federal taxation power,[28] or indeed for the entire Constitution.[29]

---

[25] Delegates also supported the Export Clause because it would encourage export industries and limit the federal government's overall taxing power. *See* pp. 10-11 *supra*. *Fairbank* v. *United States* explicitly rejected the argument that the Export Clause should be narrowly construed to apply only in the situation where a tax or duty implicates the issue of inter-regional discrimination. 181 U.S. at 292.

[26] The vast bulk of the South's Colonial-era tobacco production was exported. *See* Peter V. Bergstrom, *Markets and Merchants: Economic Diversification in Colonial Virginia, 1700-1775* 129-52 (1980); 1 Emory R. Johnson, T.W. Van Metre, G.G. Huebner & D.S. Hanchett, *History of Domestic and Foreign Commerce of the United States* 59-60 (1915).

[27] *See, e.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 290 (1901) (the Export Clause "was one of the compromises which entered into and made possible the adoption of the Constitution").

[28] 2 *Records*, *supra* note 6, at 305-06 (statement of George Mason of Virginia).

[29] *Id.* at 95 (statement of General Pinckney of South Carolina), 360 (statement of Hugh Williamson of North Carolina), 360 (statement of (continued...)

The Export Clause was opposed by other delegates, however, who wanted a strong federal government and who argued that export industries -- which would require a navy for their protection -- should be compelled to contribute to federal revenues.[30] The Government's policy argument here that exports should pay their fair share of federal revenues (U.S. Br. 35-36) was thus considered and rejected by the Convention. In the course of that debate, the delegates considered but rejected proposals for less than a total ban on export taxation, including a requirement of a two-thirds vote for such taxes, a proposal that the ban apply only to some products, a suggestion that the ban expire after a period of years, and a proposal that export taxes be prohibited only if imposed "for the purposes of revenue."[31] James Madison, a Virginian but nevertheless a strong federalist, urged a more qualified clause -- some "lesser evil than a total prohibition."[32] But a majority rejected all efforts to weaken the Clause because many delegates feared that Congress would inevitably exercise its taxing power to burden unfairly the exports of one region or another.[33] The delegates thus

---

[29](...continued)
Pierce Butler of South Carolina: "strenuously opposed to a power over exports; as unjust and alarming to the staple States").

[30] *E.g.*, 2 *Records* 220 (statement of Rufus King), 306-07 (statement of James Madison).

[31] 2 *id.* at 359-63.

[32] 2 *id.* at 363.

[33] Elbridge Gerry stated that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partial- (continued...)

adopted a bright-line approach that removed exports entirely from the federal government's powers of taxation.

The Import/Export Clause was less controversial and more qualified. That Clause was designed principally to prevent the "commercial states" (those with major ports) from imposing oppressive imposts and duties upon the trade of their neighboring non-commercial states.[34] This conduct by the commercial states was a species of the interstate discrimination that gave rise to the Commerce Clause and, accordingly, the two provisions were seen as interrelated. Indeed, some wondered whether the Import/Export Clause added significantly to the protections that would be available under the Com-

---

[33](...continued)
ly, raising one and depressing another part of it." 2 *id.* at 307. As Roger Sherman of Connecticut ultimately concluded, "it is best to prohibit the National legislature in all cases." *Id.* at 361.

Advocates and opponents alike characterized the Clause as adopted as having very broad effect. *E.g.*, *id.* at 220 (Rufus King: "the hands of the legislature were absolutely tied. . . . exports could not be taxed"), 361 (John Dickinson of Delaware: the proposed clause "must be of dangerous consequence" for it would prohibit export taxation "with respect to all articles and for ever"); George Mason, "An Old Planter," *Virginia Independent Chronicle*, Feb. 20, 1788, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution* 397 (1988) ("Our tobacco, our corn, our grain, and all the productions of the earth, are forever exempted from all taxes or all duties on exportation . . . .").

[34] *See, e.g.*, 2 *Records* 306 (statement of James Madison); 3 *id.* 542. One indication of the differing purposes and background of the Export Clause and Import/Export Clause is that Madison was an opponent of the former but a supporter of the latter. *Id.*

merce Clause.[35] There also was ready agreement that the Import/Export Clause should not be phrased in sweeping terms. For example, States were permitted to impose duties or imposts provided that Congress consented and the net revenues were provided to the federal treasury. Also, the States were allowed to impose duties and imposts to cover their costs of port inspection. Although the southern States had insisted on an unqualified Export Clause, it was the South that urged a narrowing of the Import/Export Clause to allow inspection duties.[36]

Additionally, the Import/Export Clause prohibited only "Imposts or Duties," as compared to the Export Clause's prohibition of "Tax or Duty." The reason for the different treatment of "imposts" is obvious; that term was commonly used as meaning a customs fee on imports,[37] and the Import/Export Clause but not the Export Clause implicated imports. "Duty" had a less precise meaning; sometimes it was used broadly so as to be virtually synonymous with "tax," whereas it was also often used in the narrower sense of a customs levy. For example, in testimony to the British House of Commons explaining American opposition to the Stamp Act of 1765, Benjamin Franklin observed that the term "duty" had a narrower meaning in America than in Britain: "the same

---

[35] 2 *id.* 441 (statement of Gouverneur Morris).

[36] 2 *id.* 588-89.

[37] Based on historical evidence, the Court in *Michelin* concluded that, as used in the Constitution, "'[i]mposts' were like customs duties, that is, charges levied on imports at the time and place of importation." 423 U.S. at 291. *See, e.g.*, 3 *Records* 203 ("the word *imposts* extended to duties on goods *imported*") (emphasis in original), *quoted at* 423 U.S. at 291 n.12. *See also Brown* v. *Maryland*, 25 U.S. at 437.

words have not always the same meaning here and in the Colonies. By taxes they [the Americans] mean internal taxes; by duties they mean customs . . . ."[38] Similarly, in discussing the Import/Export Clause during the 1787 Convention, Gouverneur Morris used "duty" in the same narrower sense:

> "Mr. Govr Morris . . . did not consider the dollar per Hhd laid on Tobo in Virga. as a duty on exportation, as no drawback would be allowed on Tobo. taken out of the Warehouse for internal consumption."[39]

Thus, a state tax that was applied equally to exports and domestic products ("no drawback [rebate] would be allowed . . .") was not a "duty" as that term was used in the Import/-Export Clause. This, of course, is consistent with the Court's reading of that clause in *Washington Stevedoring*.[40]

---

[38] 13 *The Papers of Benjamin Franklin* 156 (Leonard W. Labaree ed. 1969), *quoted in* 1 *The Compact Edition of the Oxford English Dictionary* 730 (1971). Johnson's Dictionary indicates that "duty" was used in England in both the broad and narrow sense: "[t]ax; impost; custom; toll." 1 Samuel Johnson, *Dictionary of the English Language* (1755). Franklin highlighted the distinction between "tax" and "duty" because he acknowledged that Parliament had the power impose to external taxes on the Colonies ("duties"), but he argued that it had no right to impose more generally applicable "internal" taxes. *See* Thomas P. Slaughter, *The Whiskey Rebellion* 17-18 (1986).

[39] 2 *Records* 589.

[40] For other discussions of the distinction between the term "duty" and "tax," *see Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895); *Pacific Ins. Co.* v. *Soule*, 74 U.S. 433, 445 (1868). Justice Thompson, in dissenting in *Brown* v. *Maryland*, drew a distinction (continued...)

Significance must be given, then, to the fact that the Framers used both "tax" and "duty" in the Export Clause (as they did when giving general taxing power to Congress in Art. I, § 8, cl. 1), but only "duty" in the Import/Export Clause.[41] To use Benjamin Franklin's phrase, the Framers intended that even "internal taxes" could not be applied by the federal government to the export process. This broader reading of the Export Clause is compelled by the text and structure of the relevant constitutional provisions, and the historical record read as a whole. As James Madison aptly wrote in summarizing the Convention's extensive debate over the scope of the Export Clause: "The result is seen in the Constitution."[42] Indeed it is: "No Tax or Duty shall be laid on Articles exported from any State."

---

[40](...continued)
between "tax" and "duty," arguing that the State licensing fee in that case was a "tax" and therefore outside the scope of the Import/Export Clause. 25 U.S. at 455-56. Clearly, "tax" was almost always used in the broader sense and "duty" often -- but not always -- in the narrower, customs sense.

[41] *See also* the notes of the Committee of Detail, which in adjoining paragraphs state "No Taxes on exports" by the federal government but "no Duty on exports" by the States. 2 *Records* 142-43.

[42] Letter of James Madison to Thomas Jefferson (Oct. 24, 1787), 3 *Records* at 135:

> "Some contended for an unlimited power over trade including exports as well as imports, and over slaves as well as other imports; some for such a power, provided the concurrence of two thirds of both Houses were required; Some for such a qualification of the power, with an exemption of exports and slaves, others for an exemption of exports only. The result is seen in the Constitution."

D. The Compelling Text of the Constitution

The most fundamental defect in the Government's argument is that it can offer no plausible basis for its interpretation of this constitutional language: "No Tax or Duty shall be laid on Articles exported from any State." It admits that a "Tax" is involved. Also, unquestionably there are "Articles" being "exported" from the States. Nor does the Government challenge Chief Justice John Marshall's statement in *Brown* v. *Maryland* or the Court's holding in *Fairbank* and other cases that imposition of a tax on the export process is the same as imposition of a tax on "Articles exported." Accordingly, the only textual argument left to the Government is that "laid on" means something like "specifically directed at" or "discriminate against." *See* U.S. Br. 34 & 36.

This position is not supportable. "Laid on" is simply a now somewhat archaic way of saying "imposed on" or "applied to." Gouverneur Morris, in the statement quoted on page 38 above, thus referred to a tax "laid on Tobo in Virga." in precisely that sense. Likewise, during the Stamp Act crisis, a Virginia delegation protested to the British Crown in these terms:

> "Your Memorialists conceive it to be a fundamental Principle . . . without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent . . . ."[43]

[43] Virginia Petitions to King and Parliament (Dec. 18, 1764), quoted in *Missouri* v. *Jenkins*, 495 U.S. 33, 68 (1990) (opinion of Kennedy, J.).

They were referring to a tax on stamps that imposed burdens on the citizenry, irrespective of any element of discrimination. More recently, in considering whether a non-discriminatory tax could be applied constitutionally to particular persons or property, the Court framed the question as whether the tax could be "laid on" such persons or property. *E.g.*, *New York* v. *United States*, 326 U.S. 572, 586 (1946) ("we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike") (Stone, C.J.); *Mayo* v. *United States*, 319 U.S. 441, 447 (1943) (a non-discriminatory Florida inspection fee violated the Supremacy Clause to the extent the fee was "laid" on activities of a U.S. government agency). Article I, § 8, cl. 1 gave Congress the power "To lay and collect Taxes," with the verb "to lay" meaning simply "to impose" or "to enact."[44]

Finally, the Import/Export Clause also uses the verb "to lay," and yet the Court's analysis in *Michelin* and *Washington Stevedoring* gave no special significance to that phrase. Instead, the Court focused on what forms of revenue measures were laid by the States -- were they "taxes" or were they "imposts or duties"?[45] The Government's argument here necessarily implies that the Court was looking at the wrong issue and that the distinction it drew between "tax," "duty," and "impost" was of no significance. So, here again, the very

[44] *See also* The Federalist No. 36, at 220 (Alexander Hamilton) ("The method of laying and collecting . . . taxes in each State can, in all its parts, be adopted and employed by the federal government.").

[45] *See also Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("The new focus [under the Import/Export Clause is] on whether the tax sought to be imposed is an 'Impost or Duty.'").

cases upon which the Government relies are contrary to its proposed analysis.

* * * *

As the Court said in *Fairbank* v. *United States*, 181 U.S. 283, 290 (1901): "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" This constitutional command cannot be swept aside by arguing that a tax that burdens exports is not "laid on" exports. The Framers intended that exports "not be made a source of revenue to the National Government" and, indeed, that the federal government "should put nothing in the way of burden upon such exports." *Id.* at 292-93. *Thames & Mersey* thus correctly construed and applied the Export Clause, and should be reaffirmed.

III. Even if the Import/Export Clause Analysis Were Relevant to This Case, the § 4371 Tax Is Still Unconstitutional as Applied.

For the reasons just discussed, the Export Clause analysis should be unaffected by recent decisions under the Import/-Export Clause. But even if that were not so, the result in this case is unchanged. As the Court of Federal Claims ruled in its alternative holding, *Thames & Mersey* and the present case are readily distinguishable on their facts from *Michelin* and *Washington Stevedoring*. *Michelin* involved a state tax on imported goods that were no longer in transit (423 U.S. at 302), and the stevedoring levy in *Washington Stevedoring* involved a tax "upon a service distinct from the goods *and their value*." 435 U.S. at 757 (emphasis added). On this point, the Court in *Washington Stevedoring* footnoted *Thames & Mersey* and observed: "In distinguishing that case from the

taxation of stevedoring activities . . ., one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n.21.

The § 4371 tax in question here, like the tax in *Thames & Mersey*, applies to the goods while in transit and bears a direct relation to the value of the goods. The tax is a percentage of the premium paid, and the premium in turn varies with the declared value of the shipment. (Pet. App. 39a) Thus, as the lower court held:

> "In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court [in *Washington Stevedoring*], but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance." (Pet. App. 29a)

On this alternative ground, then, the § 4371 tax as applied to IBM's exports is still invalid under the Export Clause, even assuming that *Michelin* and *Washington Stevedoring* are relevant precedents for the Export Clause. For example, in *Itel Containers International Corp.* v. *Huddleston*, 113 S. Ct. 1095 (1993), the Court rejected an Import/Export Clause attack on Tennessee's sales tax applied at the time the empty containers were delivered to shippers within the State. Some of those containers, in turn, were then used in import and export commerce. The Court found no constitutional infringement because the tax was "on a business transaction occurring within the taxing State" and "does not draw revenue from the

importation process . . ." 113 S. Ct. at 1106.[46] Here, by contrast, the § 4371 tax varied with the value of IBM's goods and -- by its very nature -- was applied to the exportation process.

Accordingly, the § 4371 tax is unconstitutional even under the mode of analysis applied under the Import/Export Clause. *See Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990) (non-discriminatory state tax as applied to jet fuel sold for export violated Import/Export Clause); *Virginia Indonesia Co.* v. *Harris County Appraisal Dist.*, 910 S.W.2d 905 (Tex. 1995) (non-discriminatory local ad valorem property tax as applied to exports in transit violated Import/Export Clause).

---

[46] *See also* 113 S. Ct. at 1108 (Scalia, J., concurring) ("To come within this constitutional exemption [the Import/Export Clause], . . . the taxed good must be either an import or an export 'at the time that the tax accrued.'") (quoting *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 78 (1946)).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Andrew W. Singer
James R. Atwood
Matthew S. Yeo
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Respondent
International Business
Machines Corporation

February 1996